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BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of	)	
	)	
Telecommunications Services Inside Wiring	)	CS Docket No. 95-184
	)	
Customer Premises Equipment	)	
	)	
In the Matter of	)	
	)	
Implementation of the Cable Television Consumer Protection and Competition Act of 1992:	)	MM Docket No. 92-260
	)	
Cable Home Wiring	)	

COMMENTS OF TELE-COMMUNICATIONS, INC.

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COMMENTS OF TELE-COMMUNICATIONS, INC.

Tele-Communications, Inc. ("TCI"), by its attorneys, hereby files its comments on the Second Further Notice of Proposed Rulemaking in the above-captioned proceeding.[1]

I. INTRODUCTION AND SUMMARY

The Commission lacks authority to abrogate existing exclusive contracts between MDU owners and MVPDs or to impose restrictions on

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[1] In the Matter of Telecommunications Services Inside Wiring, Customer Premises Equipment; and Implementation of the Cable Television Consumer Protection and Competition Act of 1992: Cable Home Wiring, Report and Order and Second Further Notice of Proposed Rulemaking, FCC 97-376 (released October 17, 1997) ("Inside Wiring Order" or "Second FNPRM").

exclusive MDU contracts in the future. As Congress, the courts, and the Commission have previously recognized, such contracts involve significant common law rights which are best dealt with on the state and local level.

Moreover, it is well established that the Commission may only disrupt or restrict contract and property rights pursuant to express congressional authority. In the case of exclusive contracts between MDUs and MVPDs, no such authority exists. Indeed, in the 1984 Cable Act, Congress specifically declined to give the Commission direct authority to regulate the terms of an MVPD's access to MDUs. More recently in the 1996 Act, far from finding any competitive problem with cable operators' MDU contracting practices, Congress afforded cable operators greater pricing flexibility (by removing the uniform rate structure requirement) to enable them to respond more effectively to the lower prices and sizable competitive pressures posed by alternative MVPDs.

The Commission cannot infer authority to abrogate or restrict exclusive MDU contracts from any other provision of the Communications Act. In this regard, it is important to stress that what the Second FNPRM proposes is fundamentally different from what the Commission did in the accompanying Inside Wiring Order. In the Inside Wiring Order, the Commission relied on section 623 and section 4(i) of the Communications Act as authority to adopt procedural mechanisms that would only be triggered where the

incumbent provider had no contractual, statutory, or other right to maintain its wiring in an MDU.[2] However, even assuming arguendo that sections 623 and 4(i) authorized the adoption of such procedural mechanisms, they certainly cannot justify substantive rules which would abrogate or restrict property rights, particularly where Congress, as in this case, has expressed a contrary intent.

Nor can the Commission abrogate exclusive MDU contracts via a "fresh look" mechanism. The Commission may not circumvent the limits on its authority by authorizing other parties to do what it cannot do directly. The limits which prevent the Commission from directly abrogating MDU exclusive contracts apply with equal force to any attempt by the Commission to achieve such abrogation indirectly. The Commission recently recognized this legal principle in its Universal Service proceeding where it found that the use of "fresh look" was precluded because "there is no suggestion in the statute or the legislative history that Congress anticipated abrogation of existing contracts in this context."[3]

There are also sound public policy reasons which preclude the Commission from abrogating or restricting exclusive contracts between MDU owners and MVPDs. The Commission has noted the significant benefits of exclusive MDU contracts and has recognized

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[2] TCI continues to dispute the Commission's authority to adopt even those procedural mechanisms.

[3] Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776, ¶ 547 (released May 8, 1997).

that in the highly competitive real estate marketplace MDU owners will pass along these benefits to their tenants in the form of lower rates or enhanced facilities.

Finally, even if the Commission had the authority to restrict exclusive MDU contracts, the specific "cap" and "market power" approaches set forth in the Second FNPRM should not be adopted because they are inconsistent with the realities of the marketplace and will injure, rather than enhance, consumer welfare.

II. THE COMMISSION IS NOT AUTHORIZED TO DISRUPT EXISTING OR FUTURE EXCLUSIVE CONTRACTS BETWEEN MDU OWNERS AND MVPDS.

A. The Contractual Relationship Between MDU Owners and MVPDs Is A Local Issue Beyond the Commission's Jurisdiction.

Any attempt by the Commission to limit the right of MDU owners to enter into exclusive contracts with MVPDs would impermissibly interfere with matters properly within the jurisdiction of state and local authorities. It is well settled that the rights of property owners are a matter of state or local law.[4] For example, the Commission has recognized that disputes regarding a building owner's right to dictate construction on his or her property is "a complicated local problem" and therefore beyond the Commission's

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[4] See, e.g., Hotz v. Federal Reserve Bank of Kansas City, MO, 108 F.2d 216 (8th Cir. 1939) (acknowledging the long-held principle that the rights of landowners and their lessees are governed by the law of the place where the property is located).

authority to resolve.[5] This is particularly true in the area of MDU owners' contractual relationships with MVPDs which both Congress and the Commission have recognized are "best settled at the local level."[6] Pursuant to this local jurisdiction, various states have enacted laws governing the relationship between MDU owners and MVPDs seeking access to their tenants.[7] The Commission's proposals to limit exclusive MDU contracts would impermissibly undermine Congress' decision to defer to state and local law in this area.[8]

B. The Commission Lacks The Authority To Abrogate Or Restrict Exclusive Contracts Between MDUs and MVPDs.

1. The Commission is obligated to respect contractual rights absent clear congressional intent to the contrary.

Commission abrogation of existing exclusive agreements between MDU owners and MVPDs and/or the imposition of restrictions on such

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[5] See In the Matter of Investigation of Television Interference to be Caused by the Construction of the World Trade Center by the Port of New York Authority, 10 R.R.2d (P&F) 1769, 1774 (1967).

[6] Implementation of the Provisions of the Cable Communications Policy Act of 1984, Report and Order, MM Docket No. 84-1296, 50 Fed. Reg. 18637, ¶ 80, n.51 (1985). See also 16 Cong. Rec. H10435 (daily ed. Oct. 1, 1984) (statement of Rep. Wirth) (noting that the 1984 Cable Act left the issue of MDU access to the states).

[7] See, e.g., Illinois (65 ILCS 5/11-42-11.1) (1997)); Massachusetts (Mass. Ann. Laws Ch. 166A § 22 (1997)); Nevada (Nev. Rev. Stat. Ann. § 711.255 (1997)); Rhode Island (R.I. Gen. Laws § 39-19-10)); District of Columbia (D.C. Code § 43-1844.1 (1997)).

[8] See City of New York v. FCC, 486 U.S. 57 (1988) (noting that 47 U.S.C. § 541(a)(2), the section addressing MVPD access to easements, expressly leaves such issues to state or local authorities).

agreements going forward would infringe upon significant contractual and property rights. As has been repeatedly recognized, "[t]he most fundamental private property right is the owner's ability to exclude others."[9] Moreover, "it is undeniable that contract rights are property and thus constitutionally protected."[10]

The Commission is obligated to respect these common law rights[11] and is simply "not justified ... in cavalierly disregarding private contracts."[12] Rather, as a general rule, the Commission must refrain from abrogating or restricting contracts between private parties.[13] Indeed, the Commission may only

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[9] Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600, 604 (11th Cir. 1992) (citing Loretto v. Teleprompter of Manhattan CATV Corp., 458 U.S. 419, 433 (1982)). See also Pruneyard Shopping Center, et al. v. Robins, 447 U.S. 74, 82 (1980) ("one of the essential sticks in the bundle of property rights is the right to exclude others"); Century Southwest Cable Television, Inc. v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994) (protecting the cognizable property right of a landowner to exclude a competing MVPD by entering into an exclusive contract).

[10] Ballstaedt v. Amoco Oil Co., 509 F. Supp. 1095, 1097 (N.D. Iowa 1981).

[11] See United Gas Pipe Line Co. v. Mobile Gas Service Corp. et al., 350 U.S. 332, 339-340 (1956) (recognizing that administrative agencies are bound to respect contract rights); Western Union Tel. Co. v. FCC, 815 F.2d 1495, 1501-02 (D.C. Cir. 1987)(same); Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd., 953 F.2d at 605 ("A property owner's right to exclude another's physical presence must be tenaciously guarded."); Federal Power Commission v. Sierra Pacific Power Co., 350 U.S. 348, 353-355 (1956) (same).

[12] Union Elec. Co. v. FERC, 890 F.2d 1193, 1195 (D.C. Cir. 1989) (quoting ANR Pipeline v. FERC, 771 F.2d 507, 519 (D.C. Cir. 1985)).

[13] See Federal Preemption of State and Local Regulations Pertaining to Amateur Radio Facilities, Memorandum Opinion and Order, 101 F.C.C.2d 952, ¶ 7 ("Since these restrictive covenants (continued ...)

interfere with such contract rights where Congress has clearly authorized or directed the Commission to do so.[14]

(... continued)

are contractual agreements between private parties, they are not generally a matter of concern to the Commission."); Regents of the University System of Georgia v. Carroll et al., 338 U.S. 586, 602 (1949) ("We do not read the Communications Act to give authority to the Commission to determine the validity of contracts between licensees and others.").

[14] See Sterling Savings Ass'n v. Ryan, 751 F. Supp. 871, 881 (E.D. Wa. 1990) ("[A]bsent some sort of clear statutory mandate, the court will not lightly infer that Congress has undertaken to abrogate the contractual rights of private citizens."); California Water and Tel. Co., et al., 64 F.C.C.2d 753 (1977) (noting that the power to regulate private contractual agreements, even where they directly affect communications activities, "must be conferred by Congress. [It] cannot be merely assumed by administrative officers.") (citing FTC v. Raladan Co., 283 U.S. 643, 649 (1930)); Texas & Pacific Railway Co. v. Abilene Cotton Oil Co., 204 U.S. 426, 437 (1907) ("a statute will not be construed as taking away a common law right existing at the date of its enactment, unless that result is imperatively required; that is to say, unless it be found that the pre-existing right is so repugnant to the statute that the survival of such a right would in effect deprive the subsequent statute of its efficacy; in other words, render its provisions nugatory."); Bauers v. Heisel, 361 F.2d 581, 587 (3d Cir. 1966) (en banc), cert. denied, 386 U.S. 1021 (1967) ("a statute should not be considered in derogation of the common law unless it expressly so states or the result is imperatively required from the nature of the enactment."); McNeil Real Estate Fund VI, Ltd., 953 F.2d at 605 (absent a clear congressional mandate, courts will not infer that a statute grants the authority to condition a property owner's right to exclude); Bell Atlantic Telephone Companies v. FCC, 24 F.3d 1441, 1446 (D.C. Cir. 1994) ("without express delegation of such authority from Congress, the Commission may not order a regulated entity to provide a competitor access to its facilities.").

2. Congress has specifically declined to give the Commission the necessary authority to abrogate or restrict exclusive contracts between MVPDs and MDU owners.

Nowhere in the Communications Act is the Commission given authority to abrogate or restrict exclusive contracts between MDU owners and MVPDs. As the Third Circuit has found:

> [T]here is no provision in the Communications Act expressly authorizing the Commission to regulate (i.e., supervise in the public interest) privately negotiated contracts.[15]

Indeed, Congress expressly determined that the Commission should not be given such authority in the case of the MDU owner-MVPD relationship. In the 1984 Cable Act, Congress chose not to include a provision that would have mandated access to MDUs for providing cable service.[16] A principal basis for rejecting this provision

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[15] Bell Telephone Co. of Pennsylvania v. FCC, 503 F.2d 1250, 1279 (3rd Cir. 1974), cert. denied, 422 U.S. 1026 (1975) (emphasis in original). See also id. at 1280 ("The Communications Act contains no express statement of an intention to authorize unilateral modification or abrogation of privately negotiated contracts. Nor do the various provisions of the Act 'imperatively require' that we imply such authorization.").

[16] The language not included in section 633 was as follows:

> Sec. 633(a). The owner of any multiple-unit residential or commercial building or manufactured home park may not prevent or interfere with the construction or installation of facilities necessary for a cable system, consistent with this section, if cable service or other communications service has been requested by a lessee or owner ... of a unit in such a building or park.

Cable Investments, Inc. v. Wooley, 867 F.2d 151, 156 (3rd Cir. 1989) (citing H.R. No. 4103, 98th Cong., 2d Sess. § 633 (1984); reprinted in H.R. Rep. No. 98-934, 98th Cong., 2d Sess. 13).

was articulated by Representative Fields, who commented that the goal of "mak[ing] cable service available to the greatest number of individuals ... can be achieved in a better, more orderly manner through a negotiated agreement between the cable operator and the property owner, and not by legislative fiat as this legislation had provided."[17]

Congress' decision not to adopt the restrictions on MDU contracts obviously demonstrates its intent that MDU owners be left free to enter into contracts, exclusive contracts if desirable, with MVPDs, unfettered by government regulation.[18] Thus, courts have rejected all attempts to construe the Communications Act as restricting an MDU owner's ability to limit access to its property through the use of exclusive contracts.[19] These decisions have recognized that Congress specifically intended that issues relating

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[17] 16 Cong. Rec. H10444 (daily ed. Oct. 1, 1984) (statement of Rep. Fields) (emphasis added).

[18] See INS v. Cardozo-Fonseca, 480 U.S. 421, 442-3 (1987) ("Few principles of statutory construction are more compelling than the proposition that Congress does not intend sub silentio to enact statutory language that it has earlier discarded in favor of other language.").

[19] See, e.g., Cable Investments, Inc. v. Woolley, 867 F.2d at 159 (rejecting attempt by cable operator to invoke the Communications Act in order to override the MDU owner's exclusive contract with a competing MVPD); Media General Cable of Fairfax v. Sequoyah Condominium Council of Co-owners, 991 F.2d 1169 (4th Cir. 1991) (same); Cable Holdings of Georgia v. McNeil Real Estate Fund VI, Ltd., 953 F.2d 600 (11th Cir. 1992) (the Communications Act cannot be used to usurp the right of MDU owners to exclude MVPDs from their premises); City of Lansing v. Edward Rose Realty, Inc., 502 N.W.2d 638 (Mich. 1993) (same); UACC-Midwest, Inc. v. Occidental Development, Ltd., 1991 U.S. Dist. LEXIS 4163 (W.D. Mich. 1991) (same).

to the MVPD agreements with MDU owners be dictated by the private negotiations of the parties and not by federal policy makers.[20]

Nothing has occurred since the 1984 Act to alter this congressional intent. Indeed, after passage of the 1992 Cable Act, courts continued to interpret the Communications Act as specifically preserving the same rights of MDU owners to control access to their property.[21] Moreover, Congress recently reinforced its intent to limit the Commission's authority to regulate the relationship between MVPDs and MDU owners. Specifically, in passing the Telecommunications Act of 1996, Congress exempted MDUs from the uniform rate structure requirement.[22] In doing so, Congress recognized that the MDU marketplace was particularly competitive and therefore that the Commission should lessen its regulatory oversight of MDU rates.[23]

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[20] See, e.g., Cable Investments, Inc. v. Woolley, 867 F.2d at 159 ("Our holding that the statute does not mandate giving the cable company access to the building leaves that selection to the owner of the property.").

[21] Century Southwest Cable Television, Inc. v. CIIF Associates, 33 F.3d 1068 (9th Cir. 1994) (rejecting argument that the Communications Act restricted ability of MDU owners to limit access to their premises based on the same reasoning applied prior to the 1992 Cable Act); TCI of North Dakota v. Schriock, 11 F.3d 812 (8th Cir. 1993) (same).

[22] See 47 U.S.C. § 543(d), as amended.

[23] See H.Rep. No. 204, 104th Cong., 1st Sess. 109 (1995) ("1996 Act House Report").

3. No other provision of the Communications Act authorizes the Commission to contravene this clear congressional intent.

The Commission has pointed to the following provisions as authority to regulate in the area of MDU cable wiring: (1) its authority to ensure reasonable cable rates under section 623; and (2) its authority under section 4(i) the Communications Act.[24] However, neither of these provisions provides the Commission with authority to abrogate or restrict exclusive contracts between MDU owners and MVPDs.

As an initial matter, it is important to emphasize that what the Second FNPRM is proposing to do is fundamentally different from what the Commission did in the accompanying Inside Wiring Order. In the Inside Wiring Order, the Commission relied on sections 623 and 4(i) as authority to adopt procedural mechanisms that would only be triggered where the incumbent provider had no contractual, statutory, or other right to maintain its wiring in an MDU.[25] However, even assuming arguendo that sections 623 and 4(i) authorize the adoption of such procedural mechanisms which, by the Commission's own admission, are not intended to affect MVPD contract or property rights, they certainly cannot justify substantive rules in this proceeding which would abrogate or

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[24] See Inside Wiring Order at ¶¶ 83-101.

[25] TCI continues to dispute the Commission's authority to adopt even those procedural mechanisms.

restrict contractual and property rights, particularly where Congress, as shown above, has expressed a contrary intent.

There are additional problems with a section 623 and section 4(i) analysis in this context. Section 623 directs the Commission to ensure that cable rates are reasonable. At no time has Congress indicated that restrictions on exclusive MDU contracts are necessary to ensure reasonable cable rates. To the contrary, as noted, Congress has specifically recognized that because of intense competition in the MDU marketplace, MDU cable rates already are reasonable.[26] Where congressional intent is clear, as it is here, the Commission is not at liberty to supplant Congress' policy decisions, even if the Commission believes a different policy is

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[26] See 1996 Act House Report at 109 (eliminating uniform rate structure requirement in MDUs because cable operators need greater pricing flexibility due to the presence of other MVPDs offering the same service). See also Rate Regulation, Third Order on Reconsideration, 9 F.C.C.R. 4316, at ¶ 20 (1995) (noting that competitors in the MDU market have become "important footholds for the establishment of competition to incumbent cable systems"); "Latest Battleground: Cable Fighting For MDUs," Multichannel News, July 17, 1995, at 16; "DBS Makers Target MDUs," Multichannel News, March 4, 1996, p. 5 (describing industry-wide DBS efforts to compete in the MDU market); "DirecTV, Inc. Signs Agreement with American Telecasting, Inc.; Wireless Partnerships Provide Key Local Presence for DirecTV in Multi-Unit Market," PR Newswire, December 11, 1997 (describing how DirecTV has signed a series of cooperative marketing agreements with the nation's top private cable and wireless operators to provide it with a key local sales and service presence, as well as local broadcast channel access, in MDU markets across the United States); "MDU Market Attracts Notice As Competition Enters Field," Multichannel News, December 15, 1997, at 34 (local telcos are presenting a further competitive threat in MDUs through their ability to bundle video programming with their telephone, Internet, and other service offerings for an attractive packaged price).

more appropriate.[27] This is especially true where, as noted below, Commission imposition of restrictions on exclusive MDU contracts could actually result in increased cable rates for MDU tenants by either limiting competition among MVPDs to serve an MDU or by reducing an MVPD's incentive to offer the level of benefits to an MDU it might otherwise have offered absent such regulatory restraints.

For similar reasons, the Commission cannot infer authority to limit MVPD agreements with MDUs based on its duty to promote competition in the MVPD industry.[28] It is well established that "allegations of harm to competitors or competitors' customers do not in any way expand the Commission's ... powers"[29] and the Commission may not "in effect rewrite this statutory scheme on the basis of its own conception of the equities of a particular situation."[30] Also, as demonstrated more fully below, exclusive

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[27] See, e.g., Time Warner Entertainment Co., L.P. v. FCC, 56 F.3d 151, 190-191 (D.C. Cir. 1995), cert denied, 116 S. Ct. 911 (1996) (striking down the Commission's uniform rate structure regulation because it sought, contrary to the plain language and structure of the 1992 Cable Act, to regulate systems subject to effective competition. The Court noted that "[t]he Commission's arguments highlighting problems with the choice made by Congress are insufficient to overcome this clear evidence of congressional intent.").

[28] See Second FNPRM at ¶ 203.

[29] MCI Telecommunications Corporation v. FCC, 561 F.2d 365, 375, n. 46 (D.C. Cir. 1977) (quoting AT&T v. F.C.C., 487 F.2d 865, 880 (2nd Cir. 1973), cert. denied, 434 U.S. 1040 (1978)).

[30] Id. See also FCC v. R.C.A. Communications, Inc., 346 U.S. 86, 96-7 (1953) (Commission is not free to create competition for competition's sake alone).

MDU contracts can actually improve competitive conditions and consumer welfare. Thus, there is absolutely no statutory basis for the Commission to restrict exclusive contracts in the name of promoting competition in the MVPD industry.

Moreover, the courts have made clear that sections 4(i) and 303(r) only provide the Commission with ancillary authority to adopt rules that are necessary to meet obligations specified in other sections of the Communications Act. For example, earlier this year, in Iowa Utilities Board v. FCC, the court held that sections 4(i) and 303(r):

> merely supply the FCC with ancillary authority to issue regulations that may be necessary to fulfill its primary directives contained elsewhere in the statute. Neither subsection confers additional substantive authority on the FCC.[31]

As already discussed, the Communications Act does not provide an explicit mandate which could give rise to the Commission's ancillary jurisdiction under sections 4(i) to restrict exclusive contracts between MVPDs and MDU owners.

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[31] Iowa Utilities Board v. FCC, 120 F.3d 753, 795 (8th Cir. 1997) (emphasis added). See also California v. FCC, 1997 U.S. App. LEXIS 22343, *11 (8th Cir. 1997) ("[S]ubsections 154(i) and 303(r) merely provide the FCC with ancillary authority to promulgate additional regulations that might be required in order for the Commission to meet its principal obligations contained in other provisions of the statute."); California v. FCC, 905 F.2d 1217, 1240 n.35 (9th Cir. 1990) ("Title I [of the Communications Act] is not an independent source of regulatory authority; rather, it confers on the FCC only such power as is ancillary to the Commission's specific statutory responsibilities."); United States v. Southwestern Cable Co., 392 U.S. 157, 178 (1968) (FCC's authority under Title I "is restricted to that reasonably ancillary to the effective performance of its various responsibilities for the regulation of television broadcasting.").

Equally important, section 4(i) can only provide the Commission with such ancillary authority to the extent the rules adopted are "not inconsistent" with the Communications Act.[32] As shown above, the abrogation of, or the imposition of restrictions upon, exclusive MDU contracts would be inconsistent with the Communications Act in that Congress has expressly decided that the question of access to MDUs is one that the Commission must stay out of and that MDU owners should be left free to enter into contracts, exclusive contracts if desirable, with MVPDs, unfettered by government regulation.

An analogous case in which the D.C. Circuit construed the extent of the jurisdictional reach of the Federal Energy Regulatory Commission ("FERC") crystallizes the foregoing analysis. In Richmond Power & Light of the City of Richmond, Indiana v. FERC,[33] the court confronted a situation in which Congress had contemplated empowering FERC to order "wheeling"[34] if it found such action to be "necessary and desirable in the public interest."[35] Congress decided, however, not to mandate wheeling, and so it deleted this provision prior to enactment in order to "preserve the voluntary

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[32] See Inside Wiring Order at ¶ 92.

[33] 574 F.2d 610 (D.C. Cir. 1978).

[34] "Wheeling" is the transfer by direct transmission or displacement of electric power from one utility to another over the facilities of an intermediate utility. Id. at n. 9.

[35] Id. at 619 (citation omitted).

action of the utilities."[36] The court concluded that this deletion demonstrated Congress' clear intent to "reject[] a pervasive regulatory scheme for controlling the interstate distribution of power in favor of voluntary commercial relationships."[37] The City of Richmond urged FERC to condition its approval of the rates of Richmond Power & Light for voluntary wheeling on a commitment by the company to mandatory wheeling. The court rejected this analysis, holding that FERC is not permitted to do indirectly what Congress prohibited it from doing directly.[38] Significantly, the court acknowledged that FERC, like the Commission, was required by Congress to ensure reasonable rates for power companies and that FERC, like the Commission, "does have authority to impose requirements and conditions 'necessary or appropriate to promote the policies' of the Act."[39] Nevertheless, the court concluded that neither such rate regulation authority, nor FERC's broad "necessary and proper" authority (which is akin to the Commission's 4(i) authority) could be cited to empower FERC to restrict a regulated entity's behavior in an area where Congress had determined that such relationships should be governed by marketplace forces.

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[36] Id. (citation omitted).

[37] Id. (citation omitted).

[38] Id. at 620 (citation omitted).

[39] Id. (citation omitted).

4. Where Congress has intended for the Commission to limit contractual rights, the statutory language has been very specific.

Congress has been very specific when it has wanted to provide the Commission with authority to abrogate or restrict private contracts. For example, in the program access context, Congress specifically limited the ability of cable operators and vertically integrated satellite cable programmers to enter into exclusive contracts.[40] Even in that case, however, Congress was careful to protect the contractual expectations of private parties by grandfathering existing programming agreements.[41] Congress' prohibition on the ability of local franchising authorities to award exclusive cable franchises was equally specific.[42] Moreover, in the 1996 Act, Congress authorized the Commission to preempt local governmental restrictions and private agreements that impair a viewer's ability to receive video programming services through over-the-air reception devices.[43] Similarly, in response to the Commission's view that Congress would have to provide the Commission with jurisdiction over pole attachment agreements between cable companies and utilities before the Commission could regulate in this area, Congress amended the Communications Act to

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[40] See 47 U.S.C. §§ 548(c)(2)(C), (D).

[41] See 47 U.S.C. § 548(h).

[42] See 47 U.S.C. § 541(a)(1).

[43] 1996 Act, § 207.

explicitly provide this jurisdiction.[44] Finally, Title II of the Communications Act, as amended, provides the Commission with express authority to regulate carriers' contracts concerning rates.[45]

Unlike these areas where Congress expressly conferred jurisdiction on the Commission to abrogate or restrict private contracts, Congress has never even intimated that the Commission may or should interfere with the rights of MDU owners and MVPDs to enter into exclusive agreements. As already discussed, Congress has consistently evinced precisely the opposite intent in the case of the MDU owner-MVPD relationship.

C. The Commission's "Fresh Look" Policy Cannot And Should Not Be Applied to MDU Agreements With MVPDs.

There is nothing in the Communications Act or in any of the Commission's prior decisions to suggest that the Commission could or should adopt a "fresh look" policy with regard to MDU owner exclusive contracts with MVPDs.[46] Under a "fresh look" requirement, the Commission would empower MDU owners to unilaterally abrogate their existing exclusive contracts in order that they may seek better terms from either their current MVPD or a competitor.

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[44] 47 U.S.C. § 224. See S. Rep. No. 95-580, at 14 (1978), reprinted in, 1978 U.S.C.C.A.N. 109, 122.

[45] See 47 U.S.C. §§ 201-205(a).

[46] See Second FNPRM at ¶¶ 264-265.

It is well established that the Commission may not circumvent the limits on its authority by authorizing other parties to do what it cannot do directly.[47] Thus, the limits which prevent the Commission from directly abrogating MDU exclusive contracts apply with equal force to any attempt by the Commission to achieve such abrogation indirectly via a "fresh look" mechanism.

The fact that the Commission has imposed "fresh look" in the past does not alter this conclusion. Rather, Commission precedent demonstrates that "fresh look" may only be used in highly limited circumstances and pursuant to clear congressional authority. The Commission has generally only imposed "fresh look" in order to correct common carrier rates in private contracts that had previously been found to be unreasonable in violation of express congressional directives in sections 201 through 205 of the Communications Act.[48]

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[47] See, e.g., Richmond Power & Light, 574 F.2d at 620 ("[W]hat the Commission is prohibited from doing directly it may not achieve by indirection") (citations omitted).

[48] See LEC Interconnection Order, 11 F.C.C.R. 15499, at ¶ 1095 (1996) (finding that certain LEC-CMRS interconnection contracts violate Commission rate rules, and therefore allowing CMRS providers to revise such contracts in order to implement the mutual compensation rules required by the 1996 Act); Expanded Interconnection with Local Telephone Company Facilities, Report and Order and NPRM, 7 F.C.C.R. 7369, 7463-7465 (1992) (imposing "fresh look" requirements in order to allow customers bound by long-term contracts to enforce the Commission's prescribed termination rates), recon., 8 F.C.C.R. 7341 (1993), vacated on other grounds and remanded for further proceedings, Bell Atlantic Tel. Co. v. FCC, 24 F.3d 1441 (D.C. Cir. 1994), on remand, 9 F.C.C.R. 5154, 5208 (released July 25, 1994) (affirming application of its fresh look policy); Competition in the Interstate Interexchange Marketplace, Report and Order and NPRM, 7 F.C.C.R. 2677, 2681-82 (1992) (allowing a "fresh look" at any contracts which violated

(continued ...)

Only once has the Commission imposed "fresh look" outside of this Title II rate-setting context.[49] There, the Commission imposed "fresh look" on long-term airphone service contracts entered into between GTE and various airlines pursuant to GTE's experimental license.[50] In that case, the Commission determined that no contractual or property rights were implicated by imposing "fresh look" because GTE had no right to make any commitments beyond the terms of its experimental license.[51] Clearly this case provides no predicate for abrogating (or authorizing another party to abrogate) lawful, arms-length contracts between MDUs and MVPDs.

The Commission has recently affirmed the statutory restraints on its ability to impose "fresh look" outside of these limited contexts. In its Universal Service proceeding, the Commission declined to adopt a "fresh look" requirement that would have obligated carriers with existing service contracts with schools and

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(... continued)

Commission rules by bundling 800 services with interexchange offerings). The Commission has also indicated that even in the limited circumstances in which fresh look would be authorized, it can only be used pursuant to an extensive review of the marketplace realities existing at the time the subject contracts were signed, rather than mere presumptions. See LEC Interconnection Order, 11 F.C.C.R. 15499, at ¶ 1094.

[49] See Amendment of the Commission's Rules Relative to Allocation of the 849-851/894-896 MHz Bands, Memorandum Opinion and Order, 6 F.C.C.R. 4582, 4583-84 (1991).

[50] Id. at ¶ 8.

[51] Id. at ¶ 7 & n.9.

libraries to participate in a competitive bidding process.[52] As the Commission recognized, the imposition of "fresh look" was not authorized because "there is no suggestion in the statute or the legislative history that Congress anticipated abrogation of existing contracts in this context."[53] As demonstrated above, not only is there no suggestion that Congress "anticipated abrogation of existing contracts" between MDU owners and MVPDs, there is also conclusive evidence of a congressional intent not to interfere with such contracts.

III. THE BENEFITS WHICH MDU TENANTS RECEIVE AS A RESULT OF MDU EXCLUSIVE CONTRACTS WITH MVPDS PROVIDE A STRONG PUBLIC POLICY BASIS FOR AVOIDING COMMISSION INTERFERENCE WITH SUCH AGREEMENTS.

In addition to the jurisdictional limitations discussed above, there are sound public policy reasons which preclude the Commission from abrogating or restricting exclusive contracts between MDU owners and MVPDs.

Simply stated, exclusive MDU contracts benefit MDU tenants. These benefits flow from the economics which underlie an exclusive agreement between an MVPD and an MDU owner. An MVPD enters into an exclusive MDU contract to achieve several efficiencies. As the Second FNPRM points out, for example, such agreements assure the MVPD that it will be in the building for a period long enough to

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[52] See Federal-State Joint Board on Universal Service, 12 F.C.C.R. 8776, ¶ 547 (released May 8, 1997).

[53] Id.

recover its capital investment. By guaranteeing such cost recovery, they provide the necessary incentive to MVPDs to compete for access to MDUs. In addition, exclusive agreements often provide MVPDs with a guaranteed revenue stream for an agreed-upon period of time and allow MVPDs to reduce their costs of customer acquisition and reacquisition, customer churn, and marketing. Such costs can be particularly significant in the MDU marketplace given the more highly transient nature of MDU tenants as opposed to dwellers in individual residences.

Because an exclusive MDU agreement provides such efficiencies to an MVPD, an MDU owner that is willing to offer such an agreement to an MVPD is also in the position to demand concessions from the MVPD beyond the MVPD's standard arrangements which the MDU owner would not otherwise be able to demand absent the grant of exclusivity.

One such concession which MDU owners often demand and receive from MVPDs in exchange for an exclusive agreement are lower prices for the MDU tenants in the form of a "bulk agreement."[54] For example, when TCI enters into a bulk exclusive agreement with an MDU owner, in exchange for the efficiencies and guaranteed revenue stream received by TCI, the MDU receives a discount off of TCI's standard rates to individual residences in the franchise area. Alternatively, a grant of exclusivity to an MVPD may result in

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[54] Under a bulk agreement, the MVPD signs a contract with the MDU owner to deliver service to every unit in the MDU, and the MDU owner makes one monthly payment to the MVPD for the whole MDU.